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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-344

QUINAULT PACIFIC CORPORATION;
INTERNATIONAL PAPER COMPANY;
WHITE LUMBER SALES, INC.; AND
GOLD REY FOREST PRODUCTS, INC.,
Petitioners,

versus

AETNA BUSINESS CREDIT, INC. AND
JOHN C. PENNINGTON, TRUSTEE,
Respondents.

BRIEF OF RESPONDENT AETNA BUSINESS CREDIT, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 8, 1980. *See* Petitioners' Joint Appendix at 1. That Judgment affirmed the opinion of the United States District for the Northern District of Georgia, Atlanta Division, which is unreported. The District Court's opinion had affirmed an order of the United States Bankruptcy Court, dated December 20, 1977.

QUESTION PRESENTED

Whether, based upon a review of the record in this case, the lower courts abused their discretion or were clearly erroneous in denying Petitioners' motion under Rule 60(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This controvery arises from the bankruptcy proceeding of Georgia Paneling Supply, Inc. (the "Bankrupt"), which, though a no-asset case, has been pending in the Northern District of Georgia since July 29, 1974. (Vol. II, 332-341). Petitioners hold unsecured claims against the Bankrupt for goods sold on credit. (Vol. II, R-307-331). Respondent John C. Pennington is the bankruptcy trustee ("Trustee") for the Bankrupt and was elected to that position by Petitioners. (Supp. Vol. I, R-35). Respondent Aetna Business Credit, Inc. ("Aetna") is a commercial finance company, which, during 1973 and 1974, financed the accounts receivable and inventory of the Bankrupt.

In July of 1975, Petitioners persuaded the Trustee to sue Aetna and The C & S Bank ("C&S") to recover the value of the Bankrupt's property upon which Aetna and C&S had foreclosed their respective security interests. (Supp. Vol. I, R-8). The theory of recovery was that Aetna and C&S had received voidable transfers under the bankruptcy laws as the result of their foreclosures. After reviewing the findings of a private investigator whom he had retained to develop the evidentiary support for his complaint, the Trustee determined that his claim against Aetna was not meritorious. (Supp. Vol. II, R-4-7). Accordingly, the Trustee agreed to dismiss his claim against Aetna for his costs ($350) and requested

the Bankruptcy Court to permit him to settle on that basis, leaving him free to pursue what he felt was a meritorious claim against C&S. (Vol. IV, R-933-934).

Despite the vigorous objections of Petitioners, the Bankruptcy Court after a hearing approved the proposed settlement on June 16, 1976, and denied Petitioners' request to remove the Trustee from office for proposing the settlement. (Vol. II, R-373; *see* Petitioners' Joint Appendix at 66). On appeal the District Court affirmed the Bankruptcy Court's approval of the settlement. (Vol. III, R-552). However, by a separate order, the District Court permitted Petitioners to intervene into the Trustee's lawsuit to assert their own claims against Aetna and C&S, and those claims are still pending.

After the District Court's approval of the settlement, Petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure which requested that the settlement be nullified on the basis of alleged newly-discovered evidence. (Vol. III, R-558). The alleged newly-discovered evidence demonstrated, they argued, that Aetna never made a loan to the Bankrupt and therefore foreclosed upon the wrong company. Shortly before the hearing scheduled on their Rule 60(b) motion, Petitioners requested the Bankruptcy Court to continue the hearing for 35 days, to prohibit counsel for Aetna from participating in the hearing, to "incorporate by reference" as evidence in the hearing all discovery taken in the Trustee's lawsuit, and to set aside "two to three weeks" of its calendar to devote to the hearing. (Vol. II, R-268). The Bankruptcy Court denied these several requests of Petitioners (Vol. II, R-263-267), who on the morning of the hearing filed with the District Court a notice of appeal and request for immediate review (Vol.

II, R-260) and filed with the Bankruptcy Court a motion for a stay of the hearing and for a reassignment of the case to another bankruptcy judge who could set aside two weeks of his calendar for the hearing. (Vol. II, R-252-259). The Bankruptcy Court denied Petitioners' motion and the District Court denied Petitioners' appeal as "without merit" and "frivolous". (Vol. I, R-141). Following a two-day hearing on Petitioners' Rule 60(b) motion and the submission of documentary evidence (Supp. Vol. V, R-297-309), the Bankruptcy Court on December 20, 1977, denied their motion. The District Court affirmed that denial on appeal (Vol. I, R-26) and the Court of Appeals for the Fifth Circuit likewise affirmed.

REASONS FOR DENYING WRIT

I. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Bankruptcy Court, the District Court and the Court of Appeals for the Fifth Circuit fully considered the issues raised in the instant Petition. The judgment of the Bankruptcy Court was entered after a two-day hearing (Supp. Vol. I, R-1), and was affirmed on appeal by the District Court. (Vol. I, R-26). The Court of Appeals for the Fifth Circuit, after a full briefing of the issues and oral argument, affirmed the judgments below on May 8, 1980, and denied Petitioners' petition for reconsideration on June 3, 1980.

The Courts below correctly decided the issues. The propriet[illegible]anting relief under a Rule 60(b) motion is addressed [illegible]he sound discretion of the court, *see Hand*

v. United States, 441 F.2d 529 (5th Cir. 1971), and is to be balanced against the competing interest of finality in litigation. *See In re Casco Chemical Company*, 335 F.2d 645 (5th Cir. 1964). Both the District Court and the Fifth Circuit concluded that the Bankruptcy Court had properly exercised its discretion in denying Petitioners' Rule 60(b) motion.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

There is no conflict among the Courts of Appeals respecting any issue involved in the Petition. The Bankruptcy Court the District Court and the Fifth Circuit merely applied to Petitioners' allegations of newly-discovered evidence well-settled principles of law developed under Rule 60(b). In each instance, the lower courts concluded that Petitioners had failed to carry the burden of proof necessary to sustain their motion.

III. THE DECISION BELOW WAS CORRECT ON THE MERITS

The essence of Petitioners' Rule 60(b) motion was that they had newly-discovered evidence which warranted a vacation of the Bankruptcy Court's approval of the $350 settlement between the Trustee and Aetna. Their alleged newly-discovered evidence purportedly proved that Aetna never financed the accounts receivable and inventory of the Bankrupt.

The uncontroverted evidence presented at the Rule 60(b) hearing, however, demonstrated that the loan documents reflecting the financing arrangement were signed by the Bankrupt (Vol. IV, R-938-939) and that

during 1973 and 1974 Aetna advanced funds to the Bankrupt by wire transfer directly to the Bankrupt's checking account. (Supp. Vol. I, R-20-23; Vol. IV, R-961). Moreover, both the Bankrupt's president and vice-president testified that Aetna had financed the Bankrupt. (Supp. Vol. I, R-20-23). Petitioners' sole witness at the Rule 60(b) hearing even admitted that his understanding was and had always been that Aetna had financed the Bankrupt and that he had seen nothing to change his belief. (Supp. Vol. IV, R-131-133, 184-185). Therefore, the Bankruptcy Court's rejection of Petitioners' Rule 60(b) motion on this ground was and is amply supported by the record.

Petitioners also contended in their Rule 60(b) motion that they had newly-discovered evidence that Aetna had acted in "bad faith" towards the Bankrupt. The purported act of bad faith occurred in connection with a fire that destroyed the contents of a company affiliated with the Bankrupt. Petitioners asserted that all of the insurance proceeds payable on account of the fire were paid to the Bankrupt as insured and that the Bankrupt remitted these proceeds to Aetna. A portion of the insurance proceeds, Petitioners contended, were payable on account of certain equipment that was destroyed in the fire. According to Petitioners, the equipment was owned by a Ms. Ann Roberts (one of the shareholders of the affiliated company) rather than the Bankrupt, and that Aetna turned over the portion of the insurance proceeds attributable to the equipment loss to a bank which had a first lien on the equipment. Because Ms. Roberts allegedly did not receive any of the insurance money, Petitioners argued in their Rule 60(b) motion that she was unable to purchase new equipment and, therefore, unable to revive the operations of the affiliated company

as she purportedly had intended. As a result of this discontinuation of the affiliated company's operations, Petitioners concluded that the Bankrupt was deprived of "a substantial cash flow" generated by sales through the affiliated company and thereby allegedly was rendered "irretrievably insolvent".

Petitioners represented that they were unaware prior to the settlement hearing before the Bankruptcy Court either that the fire had occurred or that Aetna had received any of the insurance proceeds. (Supp. Vol. V, R-226-233). Thus they claimed that the facts concerning the fire constituted "newly-discovered evidence" within the meaning of Rule 60(b). However, Petitioners' counsel was forced to admit at the Rule 60(b) hearing that more than two years before the settlement hearing in 1976 he had attended a deposition of the Bankrupt's officers at which both the fire and Aetna's receipt of the insurance proceeds were testified to in detail by the Bankrupt's officers. (Supp. Vol. V, R-226-233). Even assuming that this evidence could somehow be regarded as newly-discovered, Petitioners failed to show how it would have altered the outcome of the settlement hearing. As the Bankruptcy Court correctly noted, Aetna's alleged failure to remit the fire insurance proceeds to Ms. Roberts did not violate any agreement with or right of the Bankrupt. Either Aetna was entitled to all of the insurance monies as proceeds of its collateral or Ms. Roberts (or the bank) was entitled to the portion attributable to equipment. The Bankrupt, however, had no claim to the money and Petitioners do not contend that it did. It should be noted that there is nothing in the record to support the majority of Petitioners' contentions. Their sole "proof" relating to the fire consisted of the affidavit of Ms. Roberts which nowhere states the amount of in-

surance proceeds attributable to the equipment; the amount of money allegedly remitted by Aetna to the bank; the amount of sales generated through the affiliated company prior to the fire; whether Ms. Roberts, in fact, intended to use the insurance proceeds allegedly payable to her to purchase the new equipment; and whether the Bankrupt was in fact rendered insolvent as a result of the loss of the affiliated company's operations.

IV. NO JUDICIAL MISCONDUCT OCCURRED BELOW

Petitioners dwell at length upon what they claim to be evidence of misconduct by the Bankruptcy Judge, the District Court Judge and counsel for Respondents, who purportedly conspired together to deprive Petitioners of a fair hearing and to defeat their Rule 60(b) motion.

The first act of misconduct alleged by Petitioners is that the Bankruptcy Judge, the District Court Judge and counsel for Respondents engaged in *ex parte* conferences concerning the Rule 60(b) motion. There is nothing in the record to support such an assertion, Petitioners have produced no evidence to that effect, and Respondents deny that such was the case. After he entered his order denying Petitioners' Rule 60(b) motion, the Bankruptcy Judge directed counsel for Respondents to prepare and submit to him proposed findings of fact and conclusions of law. Without further discussion of the matter, Respondents prepared the proposed findings (which assumed as true the factual assertions of Petitioners), submitted them to the Bankruptcy Judge's secretary, and later received them back from the Bankruptcy Judge in edited form. Such a procedure is not only a common practice in the bankruptcy courts of

this State, but also is expressly provided for by Rule 91.8 of the Local Rules of the Northern District of Georgia. Contrary to Petitioners' implication that these facts were concealed from the courts below, Petitioners' allegations have been fully addressed in the briefs and at oral argument before the Fifth Circuit.[1]

The second act of misconduct alleged is that the Bankruptcy Judge and the Trustee had "breakfast" together prior to the Rule 60(b) hearing. As the Trustee testified in a deposition taken by Petitioners, the Bankruptcy Judge, who was unaware that the Rule 60(b) motion was scheduled for hearing later that day, was having coffee at a diner across the street from the court house and, when the Trustee entered, invited him to sit at his table. The Trustee straightaway reminded the Bankruptcy Judge that he was involved in a matter before him that day and, after exchanging a few social remarks, the two parted company without ever having once discussed any aspect of the case. A representative of one of the Petitioners, who happened to be sitting at a table next to the Bankruptcy Judge and who overheard their conversation, reported this chance encounter to Petitioner's counsel, who did not ever mention the matter until several months later at the hearing to assess Petitioners with attorney's fees for their bad faith and frivolous litigation. Apart from the fact of this coincidental encounter, Petitioners have never once asserted that anything was ever said between the Bankruptcy

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[1] In their Petition at page 11, Petitioners purport to quote the Bankruptcy Judge as having said "[w]e even discussed it . . ." The quote has reference to the findings of fact and conclusions of law requested from Respondents by the Bankruptcy Judge. The full quote, however, is preceded by the words "I don't think that . . ."

Judge and the Trustee about the hearing, and the Trustee has under oath denied that any such discussions were had. The mere fact of this encounter is neither indicative of collusion nor a basis for judicial disqualification. *See, e.g., United States v. Mitchell,* 377 F. Supp. 1312 (D.D.C. 1974), *aff'd* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied* 431 U.S. 933 (1977) (judicial disqualification was not required where judge's picture having dinner with special prosecutor had been published in newspaper which reported that judge and prosecutor had "bantered" about the case).

CONCLUSION

For the reasons stated above, it is respectfully submitted that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF GEORGIA
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R. William Ide, III, being first duly sworn, deposes and says that he served three copies of the foregoing Brief upon counsel for Petitioners and three copies of said Brief upon counsel for Respondents John C. Pennington and Freeman & Hawkins by depositing same in the United States Mail, with first class postage prepaid, addressed as follows:

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This 6 day of October, 1980.

R. William Ide III

R. WILLIAM IDE, III

Sworn to and subscribed
before me, this 6 day of
October, 1980.

Jessie L. Dumpsied

NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission expires August 10, 1981